Simon v. Adzilla, Inc [New Media] et al
Doc. 592 Att. 2

EXHIBIT 2

(PUBLIC-REDACTED VERSION)

Dockets.Justia.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--	x	
CONNECTU, INC., HOWARD WINKLEVOSS, CAMERON WINKLEVOSS, TYLER WINKLEVOSS AND DIVYA NARENDRA,	:	
	:	Index No.
Petitioners,	:	
v.	:	
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP,	:	
Respondent.	:	
--	x	

MEMORANDUM OF LAW
IN SUPPORT OF APPLICATION TO STAY ARBITRATION
PURSUANT TO CPLR 7503

PRELIMINARY STATEMENT

Petitioners ConnectU, Inc. ("ConnectU"), Howard Winklevoss, Cameron Winklevoss, Tyler Winklevoss and Divya Narendra, submit this Memorandum of Law in Support of their Application to Stay this Arbitration pursuant to New York C.P.L.R. §7503(b) (2008).

For the reasons described more fully below, this Application for a Permanent Stay should be granted.

FACTS

The relevant facts as set forth in the Verified Petition are as follows:

A. Background

ConnectU is a corporation organized under the laws of Connecticut, with its principal place of business in Greenwich, Connecticut. Petitioners Howard Winklevoss is an individual residing in the State of Connecticut. Cameron Winklevoss and Tyler Winklevoss are each individuals residing in the State of New Jersey. Petitioner Divya Narendra is an individual residing in the State of New York. The Individual Petitioners are the shareholders of ConnectU.

Respondent Quinn Emanuel Urquhart Oliver & Hedges, LLP ("Quinn Emanuel") is a Limited Liability Partnership organized and existing under the laws of the State of New York. Quinn Emanuel is a law firm.

Since approximately February 2004, Petitioners Tyler Winklevoss, Cameron Winklevoss and Divya Narendra have been involved in a well-publicized dispute with Facebook, Inc. and its CEO, Mark Zuckerberg, over the ownership of the social networking website, Facebook.com.

B. Quinn Emanuel Overreaches in its Engagement Letter

Pursuant to an engagement letter dated September 17, 2001 (the "Engagement Letter")(O'Shea Aff., Ex. A), Petitioners hired Quinn Emanuel as their counsel to represent

Petitioners in connection with their litigations against Facebook. The Engagement Letter contains a purported arbitration clause which provides:

> *Dispute Resolution*: Although unlikely, it is possible that a dispute may arise that cannot be resolved by discussions between us. We believe that some disputes can be resolved more expeditiously and with less expense by binding arbitration than in court. Any dispute regarding or arising out of our representation will be resolved by binding arbitration under the Commercial Rules of the American Arbitration Association ("AAA") before three arbitrators appointed from the AAA's Large Complex Commercial Case Panel. The arbitrators will have the authority to determine whether the dispute is arbitrable. The arbitration will be governed by both the procedural and substantive provisions of the Federal Arbitration Act. The arbitration will be held in the County of New York.
>
> As provided by New York law, you may, under certain circumstances, elect not to arbitrate disputes concerning the amount of fees owed to us. A copy of the relevant rules will be provided upon request. Any disputes concerning the amount of fees owed to us that are not arbitrated will be subject to the jurisdiction of courts located in the County of New York.

Petitioners were not advised of any of the rights they would be giving up by executing the Engagement Letter, such as their right to a trial by jury, the right to full discovery, and the right to full appellate review. Petitioners justifiably believed based on the ambiguous language of the arbitration clause quoted above, that they could elect *not* to arbitrate a dispute and instead pursue an action against Quinn Emanuel in New York courts.

Petitioners were also not provided with a copy of Part 137 of the Rule of the Chief Administrator of Courts and were never informed of their absolute right under Part 137 to reject Respondents' proposal that they agree to binding arbitration before the AAA. Quinn Emanuel did not obtain a knowing written waiver of Petitioners' rights in the form prescribed by the Rules of the Chief Administrator.

The Engagement Letter contains other examples of attorney overreaching. The Engagement Letter, for example, imposes an interest rate of over 18% per year for unpaid fees –

a rate that courts have found to be unreasonable and a breach of an attorney's duty to its client. The Engagement Letter also attempts to modify the limitations period for a professional malpractice action to one-year without disclosing to Petitioners that would have three-years for such a claim under New York law, in violation of DR 6-102(A), 22 N.Y.C.R.R. § 1200.31 (2008) which prohibits a lawyer from seeking "by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice."

C. Quinn Emanuel Mishandles the Facebook Litigation and Abandons its Clients

Respondent mishandled the Facebook litigation and committed numerous acts of malpractice and professional negligence, causing enormous financial damages to Petitioners. On or about, April 18, 2008 Respondents wrongfully abandoned their representation of Petitioners. Petitioners were forced to terminate Respondent and, on or about April 21, 2008 Petitioners notified Respondents of same

D. Quinn Emanuel Demands Arbitration and then Modifies Agreement

On or about April 24, 2008, Quinn Emanuel filed an online Demand for Arbitration with the American Arbitration Association (AAA)(the "Demand")(O'Shea Aff., Ex. B). In the Demand, Quinn Emanuel claims it is owed [redacted] in legal fees under the Engagement Letter. On May 6, 2008, Petitioners notified Quinn Emanuel that the dispute was not arbitrable. On May 7, 2008, Quinn Emanuel notified Petitioner's counsel that Respondent would commence litigation in court and would not arbitrate unless Petitioners agreed to arbitrate and agreed that arbitration would be final and binding. In an email dated May 7, 2008 Rick Werder of Quinn Emanuel wrote: **Redacted**

> [W]e do not plan to conduct a lengthy contest over arbitrability of the fee dispute before the AAA and we do not plan to pursue an arbitration with your clients holding in reserve a position that the

> arbitration result isn't final and binding. *If following your review of this email your clients persist in the position that the fee issue is not arbitrable, we will commence litigation in court.* We ask you to confirm in writing by close of business tomorrow your clients' agreement that the fee issue will be resolved by final and binding arbitration or, alternatively, that your clients do not so agree." (emphasis added.)

On May 8, 2008, Petitioners' counsel accepted Quinn Emanuel's modification of the agreement by informing Quinn Emanuel again that Petitioners did not agree that the dispute was arbitrable. On or about May 12, 2008, Respondent confirmed his modification of the Engagement Letter to the American Arbitration Association by informing them and Petitioner's counsel that Respondent did "not wish to move forward with an arbitration under circumstances in which our former clients will reserve the right to challenge the arbitral award when we prevail." Accordingly, on June 4, 2008, the American Arbitration Association confirmed modification of the agreement.

ARGUMENT

A court should grant a stay of arbitration pursuant to Section 7503(b) of the New York Civil Practice Law and Rules if the court finds that "a valid agreement was not made." See N.Y. C.P.L.R. §7503(b) (2008). Even if there is an express agreement to arbitrate, a court may grant a stay of arbitration under Section 7503(b) if it determines that enforcement of the arbitration clause would violate "law or public policy." *Larrison v. Scarola Reavis & Parent LLP*, 11 Misc.3d 572, 577, 812 N.Y.S.2d 243, 247 (Sup. Ct. Nass. Co. 2005).

Here, the arbitration clause in the Engagement Letter is invalid and unenforceable because it was obtained without Petitioners' knowing consent. The arbitration clause is also invalid and unenforceable as against public policy because it (and indeed the entire Engagement Letter) was obtained in breach of Respondent's duties to its clients and attorney disciplinary rules.

I. The Arbitration Clause in the Engagement Letter is Invalid and Unenforceable

A. Quinn Emanuel Failed to Obtain its Clients' Informed Consent

New York courts give special scrutiny to agreements between attorneys and clients, as a matter of long-standing public policy. *See Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985); *Ween v. Dow*, 35 A.D.3d 58, 62-63, 822 N.Y.S.2d 257, 261 (1st Dep't 2006). "An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client." *Jacobson*, 66 N.Y.2d at 993. Even absent fraud or undue influence, a retainer agreement may be invalid "if it appears that the attorney got the better of the bargain, unless [he] can show that the client was fully aware of the consequences and that there was no exploitation of the client's confidence in the attorney." *Jacobson*, 66 N.Y.2d at 993 (quoting *Smitas v. Rickett*, 102 A.D.2d 928, 929 (3d Dep. 1984)); *Ween*, 35 A.D.3d at 63. Therefore, "[a] retainer agreement will not be enforced in the absence of proof that it was fully comprehended by the client." *Larrison*, 812 N.Y.S.2d at 248.

An arbitration clause in a retainer agreement is therefore invalid unless the attorney can demonstrate that the client understood fully the consequences of entering into the agreement and that he obtained the clients knowing consent. *See Larrison*, 812 N.Y.S.2d at 248. In *Larrison*, the court held that a retainer agreement that "waives the client's right to access to the courts to resolve disputes arising out of the attorney client relationship" without adequate disclosures is "inherently unenforceable and against public policy" because it "violates the trust between the client and attorney in that it pits the lawyers' interests against that of the client." *Larrison*, 812 N.Y.S.2d at 248. The court reasoned:

> The terms and features of the arbitration agreement are designed, not for the client's benefit but to protect and advance the lawyer's interest in a forum of the lawyer's choosing. Adoption of such a

> practice places the lawyer in an irreconcilable ethical conflict which will only serve to further undermine the public's confidence in the profession. A lawyer has an ethical duty, to use his or her best efforts and professional judgment to advance the client's interest, not his or her own.

Id. The New York County Lawyers' Association (NYCLA) Committee on Professional Ethics (the "NYCLA Committee") similarly reasoned that a client's consent to enter into an agreement to arbitrate disputes with a lawyer "cannot be knowing without disclosure of the material differences between arbitration and litigation." *See* NYCLA Committee Opinion No. 723 (July 17, 1997) ("Opinion 723") at 3 (attached as an Appendix to this Memorandum of Law). The NYCLA Committee found:

> Chief among these differences is that an agreement to arbitrate amounts to a waiver of the right to a jury trial. Even outside the context of an attorney-client relationship, a waiver of the right to a jury trial may be unenforceable unless the choice to do so was knowing; the heightened duty of a lawyer to be fair in any relationship with a client can only increase the burden on the lawyer to make clear that a significant consequence of an arbitration clause is that the client will not be free to seek a jury to resolve the dispute.

See Opinion 723 at 3. The NYCLA Committee noted further that other material differences between litigation and arbitration that should be disclosed to the client include, without limitation, the extent of discovery rights, the right to compel production of witnesses and documents, the availability of relief, the availability of appellate review on the merits, the fees and costs payable to the arbitrator, and the availability of a public forum.[1] *Id.*

Here, Quinn Emanuel failed to obtain Petitioners' knowing consent to arbitrate to dispute because Quinn Emanuel did not disclose to Petitioners, in the Engagement Letter or otherwise,

[1] Advising the client of the desirability of consulting with separate counsel concerning the arbitration clause is an "additional safeguard," (Opinion 723 at 4) but does not, alone, satisfy an attorney's obligations to obtain knowing consent. *See Larrison*, 812 N.Y.S.2d at 248 (impractical for a client to consult independent counsel before signing a retainer agreement or a fee dispute arbitration clause.)

that Petitioners would be waiving their right to a jury a trial, nor did Quinn Emanuel disclose any other material differences between litigation and arbitration.[2] The Engagement Letter here instead induced Petitioners to enter into the arbitration agreement by highlighting the potential "upsides" to arbitration, such as the fact that it may be expeditious and less costly, while concealing the potential "downsides," which should have been disclosed.[3]

Moreover, the Engagement Letter is ambiguous, confusing and affirmatively misleading because it informed Petitioners that "under certain circumstances [they may] elect not to arbitrate disputes" and that "[a]ny disputes concerning the amount of fees owed to [Quinn Emanuel] that are not arbitrated will be subject to the jurisdiction of courts located in the County of New York." (Engagement Letter at p. 6). An ambiguous contract – and in particular, a retainer agreement, such as this one, is to be construed against the attorney who drafted it. *Jacobson*, 66 N.Y.2d at 993 (lawyer was required to establish that the client understood the terms of the ambiguous fee agreement and failed to do so). Petitioners had every reason to believe that they retained the right, at their "election," to access the courts to resolve any disputes. Respondents did not make any effort to ensure that Petitioners understood what they were signing.

Respondent cannot satisfy its burden of demonstrating that Petitioners fully comprehended the implications of the arbitration clause. The arbitration clause is therefore invalid and unenforceable.

---

[2] *Cf. Arrowhead Gold Club, LLC v. Bryan Cave, LLP*, No. 0109472/2007, 2008 WL 1840176, *4 (Sup. Ct. N.Y. Co. April 14, 2008) (enforcing arbitration clause in retainer agreement where clause specifically advised client of its rights under Part 137 and stated clearly that the parties "give up the right to a jury trial, to full discovery and to appellate review").

[3] Respondent further failed to advise Petitioners that a panel of arbitrators would most likely include lawyers, who would be sympathetic to other lawyers in a fee dispute or malpractice claim, rather than an impartial judge or jury. Respondent has, in fact, sought to stack the arbitration panel with contingent-fee litigators.

B. Quinn Emanuel's Engagement Letter is a Product of Attorney Overreaching and is Void as Against New York Public Policy

The arbitration agreement is invalid and unenforceable for the further reason that the entire Engagement Letter is a product of Quinn Emanuel's overreaching. As discussed above, attorneys owe heightened duties of care when entering into an agreement with their clients. *See Jacobson*, 66 N.Y.2d at 993; *Ween*, 35 A.D.3d at 62-63. "The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyers." *Ween*, 35 A.D.3d at 62-63. Moreover, attorney disciplinary rules in New York specifically prohibit a lawyer from seeking "by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice." *See* DR 6-102(A), 22 N.Y.C.R.R. § 1200.31 (2008). A lawyer may also not charge unreasonably excessive interest rates on unpaid fees. *Ween*, 35 A.D.2d at 64; DR 2-106(A), 22 N.Y.C.R.R. §1200.11 (2008).

Here, as discussed above, Quinn Emanuel breached its duties and took advantage of its clients by attempting to insulate itself from liability in court, without ensuring that its clients understood the consequences of their waiver. Similarly, Quinn Emanuel overreached further in the Engagement Letter by attempting to obtain their clients' consent to shorten to only one year the three-year limitations period for a malpractice claim under N.Y. C.P.L.R. §214. This attempt to limit their own liability for malpractice without first informing Petitioners of their rights and ensuring that Petitioners understood the consequences of their agreement, breached Quinn Emanuel's ethical obligations and their duty of care owed to Petitioners. *See* DR 6-102(A), 22 N.Y.C.R.R. § 1200.31 (2008) ("A lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice . . . .").

Quinn Emanuel further breached the disciplinary rules and put their own interests above its clients by setting an unreasonably and unlawfully high rate of interest of at least 18% per year (1.5% per month) for unpaid fees. *See Ween*, 35 A.D.2d at 64 (interest rate on unpaid fees must be fair and reasonable); *Kutner v. Antonacci*, 16 Misc.3d 585, 590, 937 N.Y.S.2d 859, 863 (Dist. Ct., Nass. Co. 2007) (interest rate of 16% on unpaid fees charged by attorney to client is unreasonable and excessive fee under DR 2-106(A)).

The Engagement Letter therefore is unenforceable and void because it is a product of attorney misconduct and violates public policy.

C. Quinn Emanuel failed to comply with Part 137 of the Rules of the Chief Administrator.

As attorneys practicing in this state, Respondent was required to comply with the New York's fee-dispute resolution rules and regulations promulgated by the Chief Administrator of Courts. 22 N.Y.C.R.R.§137 *et seq.* ("Part 137"). Part 137 provides that an attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by [Part 137]. Such consent shall be in writing in a form prescribed by the Board of Governors." The Standards and Guidelines promulgated by the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program (implementing Part 137) provide that to be valid "advance consent" under Section 137.2(d) of Part 137, "such consent must be knowing and informed." In addition, the model form to be used in obtaining advance consent under Section 137.2(d)[4] requires that an attorney advise the client that "(s)he has the right to use the fee arbitration procedures of Part 137" and "that (s)he is not required to arbitrate this fee dispute in an arbitral forum outside Part 137" and by signing the form, "the Client agree to **waive their rights with regard to arbitration pursuant to Part 137,**

which includes the right to reject the arbitrator(s) award by commencing an action on the merits (trial de novo) in a court of law." (bold in original).

In *Larrison*, 812 N.Y.S.2d at 248, the court recognized that these "rules were intended to instill confidence in attorneys and the legal system by providing clear guidelines as to what duties are incumbent on, and what rights inure to the benefit of the attorney and client." *Larrison*, 812 N.Y.S.2d at 248. The court found that, by setting up the Part 137, the Chief Administrator of the Courts "has indicated his intent to preempt any other action affecting this critically important aspect of the practice of law." Thus, the *Larrison* court held that absent a clear statement in the retainer agreement that "a client has an absolute right to proceed under Rule 137 . . . the election to pursue arbitration or go to Court *belongs to the client.*" *Larrison*, 812 N.Y.S.2d at 248 (emphasis added).

Here, the Engagement Letter contained no statement that Petitioners had an absolute right to proceed under Rule 137 and did not use the form prescribed by the Board of Governors. *See Morelli & Gold, LLP v. Altman*, No. 0602145/2007, 2008 WL 2693125, * 12 (Sup. Ct. N.Y. Co. June 30, 2008) (no waiver of right to *de novo* review of arbitration award where form prescribed under Part 137 not used). Indeed, the Engagement Letter does not even mention Part 137 or make any attempt to disclose to Petitioners of their rights under Part 137.[5] Instead, the Engagement Letter informed Petitioners that in "certain circumstances, they can elect to

---

[4] *See* Model Form UCS 137-16 (11/01), available at http://www.nycourts.gov/admin/feedispute/pdfs/137-16.pdf.

[5] Section 137.1(2) provides that Part 137 does not apply to "amounts in dispute involving … more than $50,000." Attorneys, however, may not escape the requirements for obtaining "advance consent" under Part 137 just because a dispute later arises that happens to exceed $50,000 and is therefore technically excluded from Part 137. Neither attorney nor client, when entering into an engagement agreement containing a waiver of the clients' right to proceed in court, can know whether Part 137 will apply because, at the time the "advance consent" is sought there is no "amount in dispute." To exempt an attorney in advance from Part 137 would lead to perverse results because a client's "advance consent" that is ineffective for a dispute under $50,000, would suddenly become effective if the dispute later exceeded $50,000.

arbitrate." As discussed above, rather than inform Petitioners of their rights, that phrase only served to confuse them. Therefore, because Respondent failed to make the required disclosures under Part 137, Petitioners retained their right to elect to proceed in court. The arbitration agreement is therefore invalid and unenforceable.

II. Quinn Emanuel Modified the Agreement and Waived Its Right to Arbitrate

Even if the arbitration clause was valid and enforceable (which it is not), Respondent gave up any contractual right to proceed in arbitration through modification of the arbitration agreement and waiver. It is well settled that a right to arbitration may be modified, waived or abandoned like any other contractual right, by action or subsequent agreement of the parties. *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 272 (1985); *Susswein v. Nationwide Ins. Co.*, 204 A.D.2d 849, 850 (3d Dep't 1994).

Here, after Petitioners objected to the arbitrability of the dispute, Respondent made clear to Petitioners on at least two occasions that it would "commence litigation in court" and would not arbitrate unless Petitioners agreed that arbitration would be final and binding. Petitioners did not agree to final and binding arbitration and accepted that the dispute would be decided in court rather than in arbitration. The American Arbitration Association itself recognized the modification. Thus, the arbitration agreement in the Engagement Letter was modified by the subsequent agreement of the parties. *See Susswein v. Nationwide Ins. Co.*, 204 A.D.2d at 849-850 (stipulation after dispute arose that issue would be "resolved by the parties in a court of competent jurisdiction" was enforceable in court to limit role of arbitrator).

Respondent therefore waived its right to arbitrate by advising Petitioners that the dispute would proceed in court and inducing Petitioners' reliance. There is therefore no valid agreement to arbitrate.

CONCLUSION

For each of the foregoing reasons, the Court should grant Petitioners' Application for a Permanent Stay of Arbitration pursuant to N.Y. C.P.L.R. §7503(b).

Dated: New York, New York
July 16, 2008

Sean F. O'Shea
Michael E. Petrella
Mark A. Weissman
O'SHEA PARTNERS LLP
90 Park Avenue, 20th Floor
New York, New York 10016
Tel: (212) 682-4426
Fax: (212) 682-4437
Attorneys for Petitioners

APPENDIX

New York County
Lawyers Assn.
JAN 27 1998
Library

NEW YORK COUNTY LAWYERS' ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 723

TOPIC: ARBITRATION CLAUSE IN LAWYER ENGAGEMENT AGREEMENT WITH CLIENT

DIGEST: A LAWYER MAY AGREE WITH A CLIENT THAT ALL DISPUTES ARISING UNDER A RETAINER AGREEMENT SHALL BE SUBJECT TO ARBITRATION, SUBJECT TO NEW YORK LAW ALLOWING AN ARBITRATOR TO AWARD PUNITIVE DAMAGES IN AN ARBITRATION OF A MALPRACTICE CLAIM, IF THE CLIENT IS FULLY INFORMED OF THE CONSEQUENCES OF THE CLAUSE AND THE MATTER IS OUTSIDE THE CONTEXT OF A DOMESTIC RELATIONS MATTER.

CODE: DR 6-102, 2-106, 5-104

QUESTION:

A lawyer wishes to provide in a retainer agreement with a client that all disputes arising under the agreement shall be subject to arbitration before the American Arbitration Association or such other arbitral body in New York affiliated with a N.Y.-based bar association, as the client may elect.

OPINION:

The Code of Professional Responsibility affords substantial flexibility to the lawyer and client in defining the terms and conditions of their relationship. Within certain broad parameters, the parties may agree on the scope and nature of the services to be rendered, the fee to be paid for such services, and the limits to be placed on the lawyer's obligation to avoid the representation of conflicting interests. *See generally* DR 2-106; DR 5-105. Such substantial flexibility is conducive to the trust and confidence essential to the relationship. Nevertheless, the lawyer's fiduciary obligations to the client require that the lawyer exercise due care to avoid overreaching or otherwise exploiting the lawyer's superior knowledge of the legal system to the client's detriment.

The present inquiry raises the question whether a lawyer may permissibly include in a retainer agreement a provision mandating that all disputes arising under the agreement be subject to arbitration. We assume that the purpose and intended effect of such a provision would be to compel arbitration of not only fee disputes but also claims of legal malpractice and breach of contract. In our opinion, subject to the caveats below and to definitive resolution of whether New York law allows an award of punitive damages in an arbitration, nothing in the Code of Professional Responsibility prohibits such an arbitration clause outside the context of domestic relations matters, as to which the Code requires a lawyer to submit to arbitration of fee disputes at the client's election.

We note at the outset that we confine our consideration to the ethical issues that an arbitration clause poses under the Code of Professional Responsibility. We do not address purely legal issues concerning the enforcement of an arbitration clause in a contract for legal services, including whether the courts of this State would regard such a clause to be inconsistent with public policy. Our research has uncovered no such ruling in this State to date. Our survey of New York law instead indicates a strong public policy favoring alternative dispute resolution mechanisms and enforcing the results of such resolutions. *See, e.g., Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 157 (1995). Indeed, the courts of this State, as well as federal courts here, have established alternative dispute resolution systems to which matters in litigation are referred by consent; the Departmental Disciplinary Committee with jurisdiction in this county has established an alternative dispute resolution mechanism for certain disciplinary complaints deemed to be more appropriately subjects of mediation rather than discipline. Whether the public policy favoring these devices will be applied in the context of an agreement between a lawyer and a client is for the courts, not this committee, to decide.

The possibility of an arbitration clause in a retainer agreement between a lawyer and a client implicates two concerns under the Code of Professional Responsibility.

The first concern is the prohibition on prospectively limiting a lawyer's liability to a client for services to be rendered. DR 6-102(A) provides in pertinent part that a "lawyer shall not seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice." The accompanying ethical consideration explains that a "lawyer who handles the affairs of the client properly has no need to attempt to limit liability for professional activities and one who does not handle the affairs of the client properly should not be permitted to do so." EC 6-6.

Whether a provision requiring arbitration of all disputes violates this prohibition depends in the first instance on a question of law beyond our jurisdiction to resolve. Specifically, under New York law, the power of an arbitrator to award punitive damages is at best unsettled: the New York Court of Appeals has held that such an award is against public policy, *see Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976), though more recent cases have begun to erode that ruling when the parties are deemed to have agreed to allow such an award, *see, e.g., Hamershlag, Kempner & Co. v. Oestrich*, 651 N.Y.S.2d 489 (1st Dep't 1996). To the extent that New York law denies an arbitrator the power to award punitive damages regardless of any contrary agreement between the parties, then a clause in an engagement letter requiring that all disputes between a lawyer and client, including malpractice claims in which punitive damages might otherwise be sought, would amount to an impermissible contract to limit prospectively the lawyer's individual liability to a client. To the extent that New York law allows an arbitrator the power to award punitive damages, either because the parties agree or otherwise, then, in our view, an arbitration clause in a retainer agreement applicable to all disputes under the agreement, including malpractice claims, that does not preclude the arbitration panel from awarding punitive damages, does not violate DR 6-102(A).

In such circumstances, an arbitration clause does not limit a lawyer's liability for malpractice, or otherwise seek to exonerate the lawyer in advance. The provision instead stipulates merely a procedure for resolving questions of liability and damages. The client remains free to assert the claim, and the lawyer remains exposed to such a claim; only the mechanism for resolving the claim is determined. *See* G. Hazard & W. Hodes, *The Law of Lawyering* 280 n.2.1. (1992). Judicial decisions and ethics opinions in other jurisdictions, some rendered under the analogous provisions of the Model Rules of Professional Conduct, agree that an arbitration clause does no violence to the letter or spirit of DR 6-102(A). *See, e.g., McGuire, Corwell & Blakey v. Grider,* 765 F. Supp. 1048 (D. Colo. 1991); Ariz. Ethics Op. 94-05 (1994); Va. Ethics Op. 638 (1984); *but cf.* Ohio Ethics Op. 96-9 (1996) (while agreeing that arbitration clauses are not prohibited by the Model Rules, the committee discourages them).

Nevertheless, there are material differences between arbitration and litigation in a court of law, and therein lies the second ethical concern that an arbitration requirement occasions. The Code manifests a concern that the terms and conditions of a client's engagement of a lawyer be reasonable and based on informed consent. *See* DR 2-106; 5-104; 5-105. As with any other term or condition of the relationship, a provision requiring arbitration of disputes must be reasonable and based on consent of the client after full disclosure of the consequences of the provision for the client.

In our view, such consent cannot be knowing without disclosure of the material differences between arbitration and litigation. Chief among these differences is that an agreement to arbitrate amounts to a waiver of the right to a jury trial. Even outside the context of an attorney-client relationship, a waiver of the right to a jury trial may be unenforceable unless the choice to do so was knowing; the heightened duty of a lawyer to be fair in any relationship with a client can only increase the burden on the lawyer to make clear that a significant consequence of an arbitration clause is that the client will not be free to seek a jury to resolve the dispute.

The right to a jury trial is not the only material difference between litigation and arbitration. Other differences may include, but may not be limited to, the extent of discovery rights, the right to compel production of witnesses and documents, the availability of relief, the availability of appellate review on the merits, the fees and costs payable to the arbitrator, the availability of a public forum, and the like. Arbitration may be faster and less expensive, a factor that may benefit the client in some respects yet also have adverse consequences for the client's freedom of choice in pursuit of the client's claim against the lawyer.

Outside the context of a particular attorney-client relationship, it is impossible to identify the specific facts that must be disclosed in order to make the client's agreement to such a clause a fair, reasonable and knowing one. Doubtless the sophistication of the client in such matters is a significant consideration in determining the extent of the disclosure required in the circumstances. A corporate client experienced in arbitrations may need little explanation of the consequences of an arbitration clause; an individual inexperienced in contested matters may need instruction on the costs and benefits of the procedure. The less sophisticated the client, the greater the duty of the lawyer to make clear in advance the import of an arbitration clause. In all circumstances, the burden is on the lawyer to provide whatever information is needed for the client fully to understand the consequences of the provision mandating arbitration of disputes.

For two reasons, we respectfully disagree with the opinion of the District of Columbia bar, in its opinion 211, that an arbitration agreement is unethical unless the client first consults with independent counsel concerning the arrangement. *See also* Md. Ethics Op. 90-12 (to the same effect that independent counsel is required); Mich. Inf. Op. RI-257 (1996) (same). First, there are numerous material terms and conditions in an agreement between a lawyer and a client which the Code contemplates will be the subject of negotiation and consultation between the lawyer and client -- including the scope of services to be performed, the fee to be charged, and whether and to what extent the lawyer may be free to represent other clients with interests adverse to those of the client -- and as to which no obligation to insist on independent counsel is imposed. Instead, the Code requires that the result of these negotiations and consultations be fair and reasonable to the client, and arise from the client's consent after disclosure of the facts material to the client's consideration. Second, to compel a client who needs a lawyer to hire another lawyer to assist in the process expresses a skepticism about the efficacy of that standard and the willingness of the bar to be faithful to it that we do not share. If anything, in our view, such a suggestion is more likely to undermine confidence in the legal profession rather than promote it.

At the same time, we have no difficulty with, and we adopt, the view of other ethics committees that a lawyer proposing an arbitration clause in a retainer agreement should give the client an opportunity, if the client so elects, to consult with independent counsel concerning the clause (or any other term and condition of the retainer). *E.g.*, N.C. Ethics Op. 107 (1991). Advising the client of the desirability of consulting with separate counsel is an additional safeguard of the fairness and reasonableness of the arrangement, and of the client's informed consent to it.

Consistent with the law in this State concerning the enforceability of arbitration provisions, the foregoing assumes that any arbitration clause will be contained in a written agreement signed by the client. It is advisable that the written agreement also set out the disclosures material to the client's consideration of the clause, and specifically provide that the arbitrator is empowered to award all relief available in a court of law. We also believe that, to constitute a reasonable condition, the arbitration clause must contemplate an established arbitral forum such as (but not limited to) the American Arbitration Association, a bar association, or some other comparable tribunal. We do not believe that it would be consistent with the Code to provide for arbitration before a tribunal the convenience, fairness and impartiality of which are not in keeping with the standards of the AAA and like tribunals.

Finally, nothing in this opinion is intended to apply to retainer agreements in domestic relations matters, as to which the Code and the law in this State impose specific requirements. In particular, DR 2-106(D) provides that in "domestic relations matters to which Part 1400 of the joint rules of the Appellate Divisions is applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client." This rule makes arbitration of fee disputes in such matters a choice for the client to make, and a lawyer may not override that rule by separate agreement with the client. *See* 22 N.Y.C.R.R. § 136; *McMahon v. Evans*, 169 Misc.2d 509, 645 N.Y.S.2d 753 (Sup. Ct. Broome Co. 1996).

CONCLUSION:

Outside the context of domestic relations matters, as to which special rules apply, and provided that New York law authorizes an arbitrator to award punitive damages in a malpractice claim submitted to arbitration under an agreement, a lawyer may ethically include a condition in a retainer agreement requiring that all disputes arising under the agreement shall be subject to arbitration in an appropriate forum authorized to award all relief available in a court of law, provided that the lawyer fully discloses the consequences of that condition to the client and allows the client the opportunity, should the client so choose, to seek independent counsel regarding the provision.

July 17, 1997